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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

JESUS MANUEL VASQUEZ,

Defendant and Appellant.

F043575

(Super. Ct. Nos. MCR13764 &  
MCR01600)

**OPINION**

**THE COURT**\*

APPEAL from a judgment of the Superior Court of Madera County. Thomas L. Bender, Judge.

Gordon S. Brownell, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Kathleen A. McKenna and Brian Alvarez, Deputy Attorneys General, for Plaintiff and Respondent.

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\* Before Harris, Acting P.J., Buckley, J. and Levy, J.

## **INTRODUCTION**

Appellant Jesus Manuel Vasquez was convicted in the Superior Court of Madera County case No. CR13764 of count II, felon in possession of a firearm, and count III, unlawful possession of ammunition. The court imposed concurrent third strike terms of 25 years to life, based on his two prior strike convictions in case No. CR01600 for robbery and assault with a deadly weapon. On appeal, he contends the court should have dismissed one of the prior strike convictions based on the nature of the prior offenses in case No. CR01600. Appellant also contends the court should have stayed the concurrent third strike term for count III pursuant to Penal Code section 654.<sup>1</sup>

## **FACTUAL AND PROCEDURAL HISTORY**

### **A. Case No. CR01600—Assault with a Deadly Weapon and Robbery**

The following incident is the basis for the prior strike convictions in this case. Around 8:30 p.m. on March 15, 1999, Madera Police Officers Noriega and Brackemeyer responded to a dispatch about a physical confrontation on Greenway Street.<sup>2</sup> When the officers arrived at the scene, several individuals ran from the area and went into an apartment. The officers contacted Lorenzo Aguirre and Marcos Cortez, who reported they had been assaulted and robbed. Aguirre and Cortez had purchased groceries at Sure Save Market that night, and Aguirre was carrying the groceries. They were walking home when they were confronted by four Hispanic male juveniles and one Hispanic female adult. The suspects were later identified as appellant, Ismael Castaneda, Faustino Alvarez, Richard Alvarez, and Michelle Lopez. The suspects spoke to the victims in

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<sup>1</sup>All further statutory citations are to the Penal Code unless otherwise indicated.

<sup>2</sup>The facts for case No. CR01600 are taken from the April 22, 1999, probation report, given appellant's guilty plea and waiver of a preliminary hearing in that case.

English but the victims did not understand them. Appellant jabbed Lorenzo Aguirre in the lower stomach with a bat. Cortez ran away and Ismael Castaneda briefly chased him.

Castaneda returned and joined the other suspects as they surrounded Lorenzo Aguirre. Appellant swung the bat and hit Aguirre in the right hand, and Aguirre dropped the groceries. Appellant again swung the bat and hit Aguirre in the left kidney area, and he fell down. As appellant hit Aguirre, the other suspects stood around him so he could not escape. Someone took Aguirre's sandals and his bag of groceries, which included a 12-pack of Budweiser beer. Aguirre was finally able to get away. When the officers found Aguirre, his right hand was swollen and bleeding, there was a swollen welt on his left kidney area, and he was doubled over in pain. Aguirre was transported to the hospital by emergency personnel.

The officers went to the apartment where the suspects had escaped. The officers knocked, identified themselves, and disclosed the reason for their presence. The officers heard several individuals running around the apartment and the interior lights were turned off. Michelle Lopez finally opened the door and pretended to be groggy, as if she just woke up. The officers asked to search the apartment. Lopez consented and said no one was there. The officers found Richard and Faustino Alvarez in bed, pretending to be asleep. Appellant and Ismael Castaneda were hiding in the bathtub.

The officers escorted the suspects into the living room. They found a partially consumed 12-pack of Budweiser beer on a table. The beer cans were cold and had condensation. Richard Alvarez whispered to one officer: "I know what they did and what happened."

The officers escorted Marcos Cortez to the apartment and asked him to look at the occupants. Cortez identified all the individuals as the persons involved in the incident. He positively identified appellant and Ismael Castaneda as the primary individuals involved in the assault, and appellant as the person who hit Lorenzo Aguirre with the bat. An officer separately interviewed Richard Alvarez and asked what he meant by his

earlier statement. Alvarez was not cooperative and said he didn't know what the officer was talking about.

**B. Disposition of Case No. CR01600**

On April 5, 1999, a complaint was filed in case No. CR01600 charging appellant and codefendant Faustino Alvarez with count I, robbery of Lorezno Aguirre (§ 211); count II, assault with a deadly weapon and by means of force likely to produce great bodily injury on Lorenzo Aguirre (§ 245, subd. (a)(1)); count III, unlawful participation in a criminal street gang (§ 186.22, subd. (a)); and count IV, attempted robbery of Marcos Cortez (§§ 664/211). As to counts I and II, it was further alleged they committed the offenses for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)), and appellant inflicted great bodily injury on the victim, Lorenzo Aguirre (§ 12022.7).

On April 6, 1999, appellant (born 1981) was found not a fit and proper subject to be dealt with under the juvenile court law pursuant to Welfare and Institutions Code section 707.

On April 7, 1999, appellant waived his right to a preliminary hearing and pleaded guilty to count I, robbery, and count II, assault with a deadly weapon, pursuant to the negotiated disposition that the remaining charges would be dismissed; he would be placed on felony probation and serve local time; and that if he was subsequently sentenced to state prison, he would be sentenced on one count and the term for the second count would be stayed pursuant to section 654.

The court advised appellant that counts I and II were strike offenses, and “[i]f you pick up a third felony as an adult you could be sentenced to 25 years to life in the State Prison. Do you understand that?” Appellant said yes. The court reviewed the change-of-plea form, and noted the factual basis for the plea was that appellant “hit a man with a stick and took his beer,” whereas the complaint alleged appellant used a bat. The prosecutor explained the victim thought appellant’s weapon was in the size and shape of a bat. Defense counsel stipulated to the factual basis.

On May 5, 1999, the court suspended imposition of sentence and placed appellant on probation for five years subject to various terms and conditions, including serving 180 days in county jail. The court admonished appellant to reform his lifestyle and stay away from “Tino” Alvarez because he was a gang member.

On March 7, 2000, a petition for revocation of probation was filed, alleging that appellant tested positive for methamphetamine.

On March 28, 2000, appellant admitted that he violated probation by possessing or using drugs. The court revoked and reinstated probation on various terms and conditions, including serving 90 days in county jail and completing substance abuse counseling.

**C. Case No. CR13764—Shooting of Michael Gamboa**

The following facts are the basis for the criminal convictions on appeal in this case. On October 1, 2002, appellant went to Michael Gamboa’s house in Madera. Appellant was still on probation in the previous case. Gamboa and appellant went into the bedroom to download music from the computer. Gamboa sat at the computer table and appellant was on the bed. Appellant produced a small black handgun from his pocket and placed it on the bed. Gamboa was surprised to see the gun. Gamboa remained at the computer table as appellant picked up the gun, twirled it around on his finger, and pointed it at Gamboa. Appellant pointed the gun at Gamboa’s head, chest, and legs. Gamboa was within four feet of appellant, and he was worried that appellant would accidentally shoot him. Gamboa was afraid the gun was loaded and repeatedly asked appellant to put down the gun. Appellant assured Gamboa it wouldn’t go off, and continued to twirl and point it for about a half hour. Appellant finally placed the gun on the bed and covered it with a piece of paper.

Gamboa was still sitting at the computer table when appellant again picked up the gun and twirled it on his finger. Gamboa suddenly heard a loud boom, looked down and saw blood, and realized he had been shot in the left shin. Gamboa testified appellant had been pointing the gun straight down toward his leg when it went off. Gamboa went into

the living room and was in extreme pain. Appellant also went into the living room and told Gamboa it was an accident, and he didn't mean to shoot him or for the gun to go off. Gamboa testified appellant was "running around scared, like he didn't know what to do."

Melissa Gamboa, Michael's sister, was in the living room when she heard the gunshot. She testified that her brother emerged from the bedroom, crying and limping, and repeatedly said that he had been shot and didn't want to die. Melissa immediately called 911, and her brother went to the couch and continued to cry in pain. Melissa testified appellant did not leave the bedroom "that quickly," and he entered the living room about a minute later. Appellant tried to hide the gun under the couch. Melissa told appellant that he couldn't do that, and he picked up the gun.

Melissa Gamboa testified that while she was on the telephone with the emergency operator, appellant told Melissa "not to tell anyone that he was there," "not to tell them anything, the person on the phone," and that "he couldn't go to jail, and not to say anything." Appellant took the gun and left before the police arrived.

Madera Police Officer Russell Suderman responded to Michael Gamboa's house and found him "in excruciating pain" from the gunshot wound to his left leg. Gamboa was yelling, screaming, and almost in tears. Gamboa said that he was playing on the computer when appellant produced a gun. Appellant kept pointing the gun at him, the gun went off, and he was wounded.

Michael Gamboa was transported to the hospital and suffered a single gunshot wound to the left shin. At the time of trial, the bullet was still in his leg, and his lower leg was completely numb as a result of the wound.

Officer Suderman arrested appellant at his residence for the shooting of Michael Gamboa. Suderman searched appellant's bedroom and found \$835 in cash, and two baggies of marijuana which weighed 20.4 grams. During the search, Suderman intercepted a telephone call in which an unknown male asked for appellant by his nickname of "Moonie," and asked "for a bowl of weed."

Michael Gamboa testified that appellant called him from jail a day or two after the shooting. Appellant asked Gamboa to tell the police that he shot himself. Gamboa testified that appellant urged him to lie and “[s]ay that I had the gun in my hand and it had went off in my hand,” instead of what really happened. Gamboa testified he didn’t respond when appellant asked him to lie about the shooting.<sup>3</sup>

Detective Johnny Smith testified that he reviewed the tape recordings of the telephone calls from the jail and determined appellant called Michael Gamboa around 6:00 p.m. on October 2, 2002. According to the tape recording, appellant asked Gamboa to tell the police that Gamboa shot himself, instead of saying that appellant shot him. Detective Smith testified appellant called an unknown female at 6:13 p.m. and repeatedly denied that he shot Gamboa. The female asked: “‘What was his name? ... The one you shot.’” Appellant replied: “‘Some guy named Michael.’”

**D. Probation Violation and Charges in Case No. CR13764**

On October 3, 2002, a probation violation petition was filed in case No. CR01600, which alleged appellant violated the terms and conditions by possessing drugs, possessing gang paraphernalia, and failing to obey all laws based on the shooting of Michael Gamboa. On October 4, 2002, appellant denied the allegations and requested a hearing.

On October 23, 2002, a complaint was filed in case No. CR13764 charging appellant with four felony offenses based on shooting of Michael Gamboa.

On November 1, 2002, a first amended probation violation petition was filed in case No. CR01600, which alleged appellant failed to report, failed to obey all laws based on the Gamboa shooting, possessed drugs, possessed gang paraphernalia, and failed to

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<sup>3</sup>At trial, Gamboa admitted he had been arrested for driving under the influence and possession of drugs shortly before the shooting incident occurred.

attend substance abuse counseling. On November 4, 2002, appellant again denied the allegations and requested a hearing.

On November 25, 2002, the court conducted the preliminary hearing in case No. CR13764 for the charges based on the shooting incident, and case No. CR13561, in which appellant was separately charged with possession of marijuana for sale (Health & Saf. Code, § 11359). The court also conducted the probation revocation hearing in case No. CR01600.

A probation officer testified appellant failed to report as ordered and failed to attend substance abuse counseling. Michael Gamboa and Officer Suderman testified about the shooting. Officer Suderman testified about the marijuana found in appellant's bedroom, and believed he possessed the drugs for sale given the quantity and the nature of the intercepted telephone call. Appellant admitted the probation violation allegation that he possessed gang paraphernalia when the officers searched his bedroom.

The court held appellant to answer on three of the four felony charges for shooting Gamboa in case No. CR13764, and for possession of marijuana for sale in case No. CR13561.<sup>4</sup> The court also found appellant violated probation in case No. CR01600, and trailed the sentencing hearing pending the outcome of the other cases.

**E. Disposition of Case No. CR13764**

On December 2, 2002, the information was filed in case No. CR13764 based on the Gamboa shooting, which charged appellant with count I, discharge of a firearm in a grossly negligent manner (§ 246.3); count II, being a felon in possession of a firearm (§ 12021, subd. (a)(1)); count III, unlawful possession of ammunition (§ 12316, subd. (b)(1)); and count IV, misdemeanor attempt to dissuade a witness, Michael Gamboa (§ 136.1, subd. (a)(2)). As to count I, it was further alleged appellant inflicted great

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<sup>4</sup>The instant record is silent as to the subsequent disposition of case No. CR13561.



bodily injury on the victim, Michael Gamboa (§ 12022.7, subd. (a)). It was also alleged appellant suffered two prior serious and/or violent felony convictions within the meaning of the three strikes law, based on his convictions in case No. CR01600 for assault with a deadly weapon and robbery (§ 667, subds. (b)-(i)). Appellant pleaded not guilty and denied the special allegations.

On February 4, 2003, appellant stipulated to his felon status and his jury trial began in case No. CR13764. Michael and Melissa Gamboa, and the investigating officers, testified as set forth *ante*. The court granted the prosecution's motion to dismiss count IV and granted appellant's motion to dismiss count I pursuant to section 1118.1.

On February 5, 2003, appellant was convicted in case No. CR13764 of count II, felon in possession of a firearm, and count III, unlawful possession of ammunition, based on his possession of the loaded weapon when he shot Michael Gamboa. Thereafter, the court conducted the bifurcated trial on the prior conviction allegations, took judicial notice of the records in case No. CR01600, and found the special allegations true.

Appellant argued that even though he had two prior strike convictions, both strikes were based on a single incident—robbery and assault of Lorenzo Aguirre—and the sentence in the prior case would have been subject to section 654. Appellant argued the court could not impose a third strike sentence based on *People v. Benson* (1998) 18 Cal.4th 24. The court deferred this issue to the sentencing hearing.

**F. Sentencing Hearing**

The probation report contained appellant's juvenile and adult record. In February 1998, a juvenile petition was found true based on appellant's violation of section 496, subdivision (a), receiving stolen property. Appellant was made a ward of the juvenile court, placed on probation, and ordered not to associate with any gang members. In June 1988, he violated probation and another juvenile petition was found true for violating section 148, subdivision (a)(1), resisting an officer. He was continued as a ward. As set forth *ante*, he pleaded guilty to robbery and assault with a deadly weapon as an adult,

based on the attack on Lorenzo Aguirre, and was placed on probation. He violated probation by testing positive for methamphetamine and was reinstated. He again violated probation for failing to report, possessing gang paraphernalia, and for shooting Michael Gamboa. He was on probation when he committed the instant offenses of being a felon in possession of a firearm and ammunition.

On June 25, 2003, appellant filed a motion in case No. CR13764 to dismiss the prior strike convictions pursuant to section 1385 and *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, and argued he was only 21 years old and outside the spirit of the three strikes law. The prosecution's opposition asserted appellant's lengthy record supported the third strike term.

On July 15, 2003, the court conducted the sentencing hearing for appellant's multiple cases. Defense counsel conceded appellant's record was "pretty bleak" but argued the court should dismiss one of the prior strike convictions because the prior offenses in case No. CR01600 occurred during a single event and were subject to section 654. Counsel argued the "most important factor" for the court to consider was that both prior strike convictions were from "a single period of abhorrent behavior for which he served a single prison term," and "both violations occurred during a single event and there's two separate strikes."

"... As you know, this issue has gone up and again will be before the Supreme Court of the State of California as to whether or not it's fair as a matter of due process for both strikes to have come from the same case and the same course of abhorrent behavior, and, of course, this is the circumstance the Court can use to exercise the Romero discretion."

The prosecutor agreed appellant's record and the facts herein were "very bleak" and argued appellant was not outside the spirit of the three strikes law, given his repeated acts of violence. "His first crimes involved getting together with a group of gang members, taking a position of leadership, beating a man with a bat to steal his beer, and then he later shoots an individual. He's a violent man committed to a life of violent

conduct, and society enacted Three Strikes to protect the community from people just like Mr. Vasquez.”

The court stated it had dismissed strike convictions in other cases, but denied appellant’s motion given the nature and circumstances of his case:

“... I mean, you know, he started out in juvenile court in ‘98. He was made a ward for [section] 496. There’s to be no gang associations. Since that time, he hasn’t changed his behavior. And then he picked up as an adult in 1999, the [sections] 211 and the 245(a)(1), which are violent crimes, and then I heard the trial in this case, and, you know, he’s waiving a gun at his—well, I’ll refer to him as a friend, but I’m not sure about that, and he shoots his friend and has basically no remorse for doing it, and isn’t even concerned about his friend, the injuries to his friend. I think he is a violent person, and this is exactly what—why Three Strikes legislation was enacted, so for those reasons as well as the reasons set forth in the Probation Report, the motion is denied.”

In case No. CR01600, the court revoked and refused to reinstate probation, and imposed the upper term of five years for count I, robbery, and the upper term of four years for count II, assault with a deadly weapon, and stayed the term imposed for count II pursuant to section 654.

In case No. CR13764, the court denied probation and imposed concurrent third strike terms of 25 years to life for count II, felon in possession of a firearm, and count III, unlawful possession of ammunition. The court ordered the terms imposed in case No. CR13764 to run consecutively to that imposed in case No. CR01600, so that appellant’s aggregate term was five years plus 25 years to life.

On July 30, 2003, appellant filed a timely notice of appeal for both case Nos. CR01600 and CR13764.

## **DISCUSSION**

### **I.**

#### **THE TRIAL COURT PROPERLY DENIED APPELLANT’S MOTION TO DISMISS**

Appellant contends the trial court abused its discretion in case No. CR13764 when it declined to grant his motion to dismiss one of his prior strike convictions. As a preliminary matter, respondent relies on *People v. Benevides* (1998) 64 Cal.App.4th 728, and argues that we may not review the trial court’s decision not to dismiss a prior strike conviction. The California Supreme Court has recently overruled *Benevides* and held that a trial court’s failure to dismiss or strike a prior conviction pursuant to section 1385 is subject to appellate review under the deferential abuse of discretion standard. (*People v. Carmony* (2004) 33 Cal.4th 367, 374-376 (*Carmony*).)

Section 1385 permits the trial court to exercise its discretion and dismiss a prior strike conviction if the dismissal is in furtherance of justice. (§ 1385, subd. (a); *People v. Garcia* (1999) 20 Cal.4th 490, 499, 502; *People v. Williams* (1998) 17 Cal.4th 148, 158; *People v. Superior Court (Romero)*, *supra*, 13 Cal.4th at pp. 529-530.) As the Supreme Court stated in *Williams* in deciding whether to strike a prior conviction:

“[T]he court in question must consider whether, in light of the nature and circumstances of [the defendant’s] present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme’s spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*People v. Williams, supra*, 17 Cal.4th at p. 161.)

By the deferential standard of review of a *Romero* ruling, the trial court’s decision is “subject to review for abuse of discretion. This standard is deferential. [Citations.] But it is not empty. Although variously phrased in various decisions [citation], it asks in substance whether the ruling in question ‘falls outside the bounds of reason’ under the applicable law and the relevant facts [citations].” (*People v. Williams, supra*, 17 Cal.4th

at p. 162.) To show an abuse of discretion, the defendant must demonstrate the trial court's decision "was irrational or arbitrary. It is not enough to show that reasonable people might disagree about whether to strike one or more of [the] prior convictions." (*People v. Myers* (1999) 69 Cal.App.4th 305, 309-310.) When the record shows the trial court considered relevant factors and acted to achieve legitimate sentencing objectives, the decision will not be disturbed on appeal. (*Id.* at p. 310.)

*Carmony* extensively discussed the nature of this deferential review as it applies to three strikes cases.

"[T]he three strikes law not only establishes a sentencing norm, it carefully circumscribes the trial court's power to depart from this norm and requires the court to explicitly justify its decision to do so. In doing so, the law creates a strong presumption that any sentence that conforms to these sentencing norms is both rational and proper.

"In light of this presumption, a trial court will only abuse its discretion in failing to strike a prior felony conviction allegation in limited circumstances. For example, an abuse of discretion occurs where the trial court was not 'aware of its discretion' to dismiss [citation], or where the court considered impermissible factors in declining to dismiss [citation]. Moreover, 'the sentencing norms [established by the Three Strikes law may, as a matter of law,] produce[] an "arbitrary, capricious or patently absurd" result' under the specific facts of a particular case. [Citation.]

"But '[i]t is not enough to show that reasonable people might disagree about whether to strike one or more' prior conviction allegations. [Citation.] Where the record is silent [citation], or '[w]here the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance' [citation]. Because the circumstances must be 'extraordinary ... by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack' [citation], the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary. Of course, in such an extraordinary case—where the relevant factors described in [*People v.*] *Williams*, *supra*, 17 Cal.4th 148, manifestly support the striking of a prior

conviction and no reasonable minds could differ—the failure to strike would constitute an abuse of discretion.” (*Carmony, supra*, 33 Cal.4th at p. 378.)

With these standards in mind, we turn to appellant’s assignment of error. Appellant’s prior strike convictions were from case No. CR01600, for robbery and assault with a deadly weapon against Lorenzo Aguirre, based on the incident when appellant confronted and beat the victim, and stole his groceries. Appellant contends the trial court abused its discretion and should have dismissed one strike because both prior convictions were based on a single act against a single victim.

Appellant’s argument is based on *People v. Benson, supra*, 18 Cal.4th 24, which held that a prior conviction, for which the sentence had been stayed under section 654, may nevertheless be treated as a strike for purposes of the three strikes law. (*People v. Benson, supra*, at pp. 26, 29-33.) In *Benson*, defendant had two strikes—residential burglary and assault with intent to commit murder—which were based on a knife attack on the victim inside her apartment. In the underlying prosecution, the trial court stayed the sentence imposed for the assault conviction under section 654. When the two convictions were later charged as strikes, the trial court declined to dismiss one of them pursuant to section 1385. (*People v. Benson, supra*, at pp. 27-28.)

*Benson* held the trial court in the subsequent three strikes case properly declined to dismiss the prior conviction for which the sentence had been stayed pursuant to section 654, based on the language, legislative history, and legislative purpose of the three strikes law. (*People v. Benson, supra*, 18 Cal.4th at p. 30.)

“... We must conclude, based upon the plain language of the statute, that the Legislature and the voters through the initiative process clearly intended that each conviction for a serious or violent felony counts as a prior conviction for sentencing purposes under the Three Strikes law, even where the convictions were based upon conduct against a single victim committed at the same time with a single intent, and where pursuant to section 654 the defendant was punished for only a single crime.” (*People v. Benson, supra*, 18 Cal.4th at p. 30.)

*Benson* further held there was a rational basis for the legislative purpose of the three strikes law to treat, as separate strikes, convictions for which separate punishment would have been barred under section 654. (*People v. Benson, supra*, 18 Cal.4th at pp. 28-29.)

“[T]here clearly was a rational basis upon which the electorate and the Legislature could direct the courts, in cases involving a defendant with two prior felony *convictions* who thereafter commits a subsequent felony, to count *each* prior felony conviction as a strike, in effect declining to extend the leniency previously afforded the defendant when sentence on a prior felony conviction was stayed under section 654. In the present case, defendant received the benefit of section 654 when he was sentenced for the [prior] felonies . . . ; *it was only when defendant reoffended after the enactment of the Three Strikes law that he faced the prolonged incarceration of which he now complains.* The Three Strikes law provided him with notice that he would be treated as a recidivist if he reoffended. [Citation.] He choose to ignore that notice and commit a subsequent felony.” (*People v. Benson, supra*, 18 Cal.4th at pp. 34-35, italics in original, fn. omitted.)

*Benson* acknowledged the trial court still retained discretion pursuant to *Romero* and section 1385 to dismiss any strike conviction in the interests of justice. (*People v. Benson, supra*, 18 Cal.4th at p. 36.) In dicta in a footnote, the court observed:

“Because the proper exercise of a trial court’s discretion under section 1385 necessarily relates to the circumstances of a particular defendant’s current and past criminal conduct, we need not and do not determine whether there are some circumstances in which two prior felony convictions are so closely connected—for example, when multiple convictions arise out of a single act by the defendant as distinguished from multiple acts committed in an indivisible course of conduct—that a trial court would abuse its discretion under section 1385 if it failed to strike one of the priors.” (*People v. Benson, supra*, 18 Cal.4th at p. 36, fn. 8.)

Appellant relies on this footnote for his argument that the trial court should have dismissed one prior strike conviction.

In *People v. Sanchez* (2001) 24 Cal.4th 983, the California Supreme Court briefly revisited the *Benson* footnote. *Sanchez* held that gross vehicular manslaughter while intoxicated was not a lesser included offense of murder, so that a defendant could be

convicted of both crimes even though section 654 would probably preclude punishment for both offenses. (*Id.* at p. 992.) *Sanchez* declined to address defendant's argument that, based on *Benson*, the two convictions could be used as separate strikes in a subsequent three strikes prosecution. (*Id.* at pp. 992-993.)

"... We are not faced with that question in the present case, but we believe it is appropriate and prudent to note that in this court's decision in *Benson*, we observed that a trial court may strike a prior felony conviction under section 1385, and that we left open the possibility that 'there are some circumstances in which two prior felony convictions are so closely connected ... that a trial court would abuse its discretion under section 1385 if it failed to strike one of the priors.' (*People v. Benson, supra*, 18 Cal.4th at p. 36, and fn. 8.)" (*People v. Sanchez, supra*, 24 Cal.4th at p. 993.)

In *People v. Ortega* (2000) 84 Cal.App.4th 659, defendant argued the trial court should dismiss one of his current offenses to avoid the future use of that conviction as a separate strike. Defendant was convicted of attempted voluntary manslaughter and assault with a firearm, and argued the trial court should have dismissed the assault conviction because both offenses were based on the same facts and same acts, and the court stayed the term for assault. (*Id.* at pp. 662-663.) *Ortega* held the trial court did not abuse its discretion in refusing to dismiss one of the current convictions, even though both convictions arose from a single act and the court stayed the term for assault. (*Id.* at pp. 665-667.)

"The issue of possible double punishment will not arise unless and until [defendant] reoffends at some point in the future. At such time, a future court must determine whether the prior attempted manslaughter and assault with a firearm conviction constitutes one strike or two and whether one or more strikes should be dismissed in the interest of justice. As recognized by the trial judge below, the issue of *Romero* relief properly may be considered by such future court. That court would consider a variety of factors, including whether the conduct resulting in the stayed sentence here was a single act and whether the Supreme Court's footnote 8 in *Benson* would require that court to strike the use of that conviction as a strike. ([*People v. Benson, supra*, 18 Cal.4th at p. 36, fn. 8.])" (*People v. Ortega, supra*, 84 Cal.App.4th at p. 668.)



*Ortega* noted *Benson*'s footnote "implies that there conceivably may be other circumstances in which the two prior felonies are 'so closely connected' that a trial court would abuse its discretion in failing to strike one of the priors. We can think of none other than the single-act example noted by the Supreme Court." (*People v. Ortega, supra*, 84 Cal.App.4th at p. 665, fn. 6.) *Ortega* thus concluded *Benson* was not applicable to the dismissal of current convictions to avoid future strikes.

In *People v. Burgos* (2004) 117 Cal.App.4th 1209, Division Two of the Court of Appeal, Second Appellate District, relied on the *Benson* footnote and held the trial court should have dismissed one of defendant's prior strike convictions. Defendant was convicted of second degree robbery and assault by means of force likely to produce great bodily injury, and had prior strike convictions for attempted robbery and attempted carjacking. Defendant argued the trial court should have dismissed one strike because both prior convictions were based on a single act and his criminal record did not otherwise support a third strike term. (*Id.* at pp. 1211, 1214.)

*Burgos* agreed with defendant, and extensively discussed the meaning of *Benson*'s footnote:

"As the Supreme Court indicated in *Benson*, a prior conviction which qualifies as a strike may have been stayed pursuant to section 654 under either of two different rationales—either because the defendant's multiple convictions resulted from multiple acts arising from an indivisible course of conduct, or because the convictions resulted from the same single act. [Citation.] The Supreme Court's language in footnote 8 in *Benson*, quoted above, strongly indicates that where the two priors were so closely connected as to have arisen from a single act, it would necessarily constitute an abuse of discretion to refuse to strike one of the priors." (*People v. Burgos, supra*, 117 Cal.App.4th at p. 1215.)

*Burgos* noted the Supreme Court reiterated this language in *People v. Sanchez, supra*, 24 Cal.4th at page 993, and concluded the circumstances anticipated in *Benson* and *Sanchez* were present in defendant's case.

“Here, [defendant’s] two prior convictions, attempted carjacking and attempted robbery, were, in the language of *Benson*, ‘so closely connected,’ having arisen from the same single act, that failure to strike one of them must be deemed an abuse of discretion. In the case of these particular offenses, not only did the two prior convictions arise from the same act, but, unlike perhaps any other two crimes, there exists an express statutory preclusion on sentencing for both offenses. Section 215, subdivision (c) permits the prosecution to charge a defendant with both carjacking and robbery under section 211, but expressly states that ‘no defendant may be punished under this section and Section 211 for the same act which constitutes a violation of both this section and Section 211.’ While this provision does not refer to the use of the convictions as priors in a later prosecution such as the one before us, it reinforces our belief that infliction of punishment in this case based on both convictions constitutes an abuse of discretion.

“[Defendant’s] strike priors arose from a single criminal act. His criminal history aside from the strike convictions consisted of misdemeanors, including a juvenile finding of battery on his sister and adult convictions of interference with a bus driver, unruly behavior at a bus terminal, and littering, and of one felony conviction for sale of a substance in lieu of a controlled substance, the matter for which he was in the holding cell where he committed the current offenses. While the current offenses were not merely petty theft or drug possession offenses, neither were they, under the circumstances, the worst of crimes. Consideration of the term the defendant will serve is appropriate in the determination as to whether to strike a prior conviction. [Citation.] [Defendant] can be sentenced as a second-strike defendant to a term as long as 20 years, comprised of the upper term for second degree robbery and a consecutive term for assault, both doubled under the three strikes law, with a great bodily injury enhancement and a section 667, subdivision (a) enhancement.” (*People v. Burgos, supra*, 117 Cal.App.4th at pp. 1216-1217.)

*Burgos* thus concluded the trial court abused its discretion when it declined to strike the prior conviction, based on the circumstances of the current and previous offenses.

(*People v. Burgos, supra*, 117 Cal.App.4th at p. 1217; see also *People v. Smith* (2003) 110 Cal.App.4th 1072, 1083, fn. 4 (conc. & dis. opn. of Johnson, J.).)

Appellant contends the trial court improperly denied his motion to dismiss and completely ignored the application of the *Benson* footnote to this case. Appellant asserts the nature and circumstances of his prior convictions present the situation anticipated in

the *Benson* footnote, because the two offenses—robbery and assault with a deadly weapon against Lorenzo Aguirre—occurred during a single incident and had a single intent.

In the instant case, however, the trial court did not abuse its discretion when it denied appellant’s motion to dismiss one prior strike conviction. Indeed, appellant’s lengthy criminal record supports the court’s determination that appellant was not outside the spirit of the three strikes law. Appellant’s prior convictions were not limited to the single incident which resulted in the two offenses pleaded and provided as strikes. He was repeatedly placed on probation but he repeatedly reoffended. Thus, incarceration and the threat of incarceration failed to deter appellant’s criminal conduct.

Appellant does not suggest, nor can we conceive, how the mere fact the prior strike convictions occurred during a single episode could have tipped the balance of factors in his favor or rendered the trial court’s failure to dismiss as an abuse of discretion. As the record demonstrates, the trial court clearly understood and considered the relevant factors to determine whether to exercise its discretion. The court extensively reviewed the nature and circumstances of appellant’s record and determined this was not an appropriate case to dismiss one of the prior strike convictions. The court also noted appellant’s lengthy record and his repeated failure to comply with the terms of probation. We cannot conclude the court’s discretionary denial of appellant’s motion to dismiss was irrational or arbitrary. To the contrary, “the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law ....” (*People v. Myers, supra*, 69 Cal.App.4th at p. 310.)

We thus conclude that even if appellant’s *Benson* argument is considered, the court did not abuse its discretion when it declined to dismiss one prior strike conviction. As the California Supreme Court recently clarified:

“... Because the circumstances must be ‘extraordinary ... by which a career criminal can be deemed to fall outside the spirit of the very scheme within

which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack' [citation], the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary.” (*Carmony, supra*, 33 Cal.4th at p. 378.)

The entirety of the record fails to reflect the extraordinary circumstances contemplated by *Carmony*, and instead reflects appellant was clearly within the spirit of the three strikes statutory scheme.

## II.

### **SECTION 654**

In case No. CR13764, appellant was convicted of count II, felon in possession of a firearm, and count III, unlawful possession of ammunition, and the court imposed concurrent third strike terms. Appellant contends, and respondent concedes, the court should have stayed the imposition of count III pursuant to section 654 because both offenses were based on the single incident of possessing a loaded weapon.<sup>5</sup>

The identical issue was addressed in *People v. Lopez* (2004) 119 Cal.App.4th 132 (petn. for review pending, petn. filed Jul. 13, 2004), where defendant was convicted of the same two offenses as in the instant case, and the convictions were based on defendant's possession of a loaded weapon. Defendant was sentenced to concurrent terms, and argued one of the terms should be stayed pursuant to section 654. (*Id.* at pp. 138-139.) *Lopez* held:

“While possession of an unloaded firearm alone can aid a person committing another crime, possession of ammunition alone will not. The former may be used as a club and a victim may be fearful that the firearm is loaded. While the latter may be thrown at a victim, it is extremely unlikely that possession of bullets alone would scare anyone but the most timid. In

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<sup>5</sup>Appellant did not raise this issue in his opening brief but this court granted the parties leave to file supplemental letter briefs to address this issue.

combination, however, the mixture is lethal and that is why criminals have a penchant for loaded firearms.

“The Legislature has wisely declared that specified people should not possess firearms and/or ammunition. The obvious legislative intent is to prohibit these persons from combining firearms with ammunition. Appellant’s obvious intent was to possess a loaded firearm.

“In resolving section 654 issues, our California Supreme Court has recently stated that the appellate courts should not ‘parse[] the objectives too finely.’ (*People v. Britt* [(2004)] 32 Cal.4th [944,] 953.) To allow multiple punishment for possessing ammunition in a firearm would, in our judgment, parse the objectives too finely. While there may be instances when multiple punishment is lawful for possession of a firearm and ammunition, the instant case is not one of them. Where, as here, all of the ammunition is loaded into the firearm, an ‘indivisible course of conduct’ is present and section 654 precludes multiple punishment.” (*People v. Lopez, supra*, 119 Cal.App.4th at p. 138.)

*Lopez* thus stayed the sentence imposed for possession of ammunition.

Respondent concedes the same situation exists in the instant case. Appellant’s convictions for unlawful possession of a firearm and ammunition were based on the single act of his unlawful possession of a loaded weapon. There was no evidence appellant possessed ammunition other than what was in the loaded handgun. Therefore, the concurrent third strike term imposed in case No. CR13764 for count III, felon in possession of ammunition, must be stayed pursuant to section 654.

### **DISPOSITION**

The concurrent third strike term imposed in case No. CR13764 for count III, unlawful possession of ammunition, is stayed pursuant to section 654 pending finality of the judgment and service of sentence imposed for count II and in case No. CR01600, such stay to become permanent upon completion of sentence. The superior court is ordered to prepare an amended abstract of judgment to so show this modification and to forward a copy to the Department of Corrections. As so modified, the judgments in case Nos. CR13764 and CR01600 are affirmed.